# MALAYSIAN REPORTS

## MOHAMED MUSTAFA v. SYED AHMAD

**[F.C. (Suffian, Gill and Ong Hock Sim F.JJ.) May 4, 1972]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 94 of 1971]**

*Practice and Procedure — Parties — Misnomer — Amendment — Whether mistake in name of plaintiff a mere irregularity — Whether irregularity waived by entry of unconditional appearance — R.S.C. 1957 O. 16 rr. 2 & 12, O. 28 r. 6 & O. 48A.*

The plaintiff/respondent claimed from the defendant/appellant a sum of $8,342.05, being the amount alleged to have been overdrawn without authority by the appellant between April 1, 1962 and May 18, 1966, whilst he was employed as manager at the respondent's shop. The appellant pleaded that he was entitled to the money taken, being part payment of his commission due from the respondent, and further counterclaimed for the sum of $16,129, being the balance alleged to be due to him as commission.

The action was commenced in the firm name of the shop of which the respondent was sole proprietor at the time of the filing of the action. The appellant entered appearance without taking an objection to the manner in which the suit was framed, and no objection was taken to it in his statement of defence.

A preliminary point of law was taken by the appellant at the trial of the action to the effect that a sole proprietor was precluded from bringing an action in court in his trading name by virtue of the provisions of Order 48A. The respondent submitted that, as no objection was taken until the date of the trial, the appellant must be presumed to have waived his objection. Having heard arguments from the parties the learned trial judge granted leave for an amendment to the title of the action by substituting the name of the plaintiff/respondent in place of the name of his trading firm. This was done under O. 28 r. 6 and the trial proceeded on the basis of the amendment allowed.

Having heard all the evidence the court below accepted the plaintiff/respondent's evidence, allowed his claim and rejected the defendant/appellant's counterclaim.

The defendant/appellant appealed on the following grounds: (1) the learned trial judge erred in law in allowing the plaintiff to amend the title of the action which amounted to substitution of a plaintiff in one capacity with a plaintiff in a different capacity, and that he further failed to appreciate that the action was constituted contrary to O. 48A; (2) as the plaintiff had sold his business before the trial of the action, at the date of hearing he had no interest in the subject matter of the claim; (3) the learned judge erred in law and fact in failing to scrutinize the evidence for the plaintiff in support of his case to draw proper inferences from the inconsistences, improbabilities and contradictions in his evidence; (4) the learned judge failed to appreciate that the plaintiff by his conduct had already waived all claims, if any, against the defendant for all sums of money which the defendant had allegedly drawn without authority; (5) the learned judge misdirected himself on the burden of proof which the defendant had to discharge in proving his case and rebutting the case of the plaintiff; (6) (a) the learned judge erred in law and fact in rejecting the evidence of the defendant and of his witnesses; (b) in any event his findings were unreasonable.

**Held,** dismissing the appeal: (1) there was no merit in the first ground of appeal. The learned judge was right in allowing the amendment. In this case no objection was taken until four years after the filing of the action. The mistake in this case was regarding the name of the plaintiff, the action having been commend in the name of the firm instead of the proprietor. It was a mere irregularity which could be corrected by an amendment under O. 28 and O. 16 rr. 2 & 12. The amendment was also rightly allowed on the ground that the defendant must be presumed to have waived the irregularity in that he entered an unconditional appearance to the action, made no point of the irregularity in his statement of defence and made no application for the suit to be struck out until the action came on for trial;

(2) the point in the second ground of appeal was never raised in the statement of defence or at the trial of the action;

(3) there was no substance in the third ground of appeal as it was clear from the judgment of the learned judge that he arrived at his conclusion upon consideration of the whole of the evidence before him;

(4) there was no merit in the fourth ground of appeal;

(5) the burden of proof in a civil case is always on the balance of probabilities. In this case it was not suggested how the judge misdirected himself, and there was nothing in his judgment to indicate any such misdirection;

(6) having seen and heard the witnesses for both sides, the learned judge had the advantage, which the appellate court could not possibly have, to evaluate such evidence and to arrive at his conclusions on that evidence.

*Cases referred to:-*

(1) *Mason & Son* v. *Mogridge* (1891-92) 8 T.L.R. 805.

(2) *Re Nos. 55 & 57, Holmes Road, Kentish Town* [1958] 2 All E.R. 311.

(3) *Davies* v. *Elsby Brothers, Ltd.* [1960] 3 All E.R. 672.

(4) *Tetlow* v. *Orela, Ltd.* [1920] 2 Ch. 24.

(5) *Duckett* v. *Gover* (1877) 6 Ch.D. 82.

(6) *Western National Bank of City of New York* v. *Perez, Triana & Co.* [1891] 1 Q.B. 304.

(7) *Hughes* v. *Pump House Hotel Co. (No. 2)* [1902] 2 K.B. 485.

(8) *Noble Lowndes & Partners (a Firm)* v. *Hadfields Ltd.* [1939] Ch. 569.

FEDERAL COURT.

*A. K. J. D'Cruz* (*M. A. Gomes* with him) for the appellant.

*David Tay Seow Hai* for the respondent.

*Cur. Adv. Vult.*

**Gill F.J.:** This appeal arises out of an action in which the plaintiff claimed from the defendant a sum of $8,342.05 being the amount alleged to have been overdrawn without authority by the defendant between April 1, 1962 and May 18, 1966, whilst he was employed as manager at the plaintiff's shop in Seremban known as "News and Periodical Stores".

The defendant pleaded that he had taken the money from the plaintiff firm as he was in fact entitled to it as part payment of his commission due from the plaintiff as agreed between them orally before he commenced his employment with the plaintiff. He further counter-claimed for the sum of $16,129 being the balance alleged to be due to him as commission.

The action was commenced in the firm name of "News and Periodical Stores", of which the plaintiff was admittedly the sole proprietor at the time of the filing of the action. This was done presumably in the mistaken belief that just as an action could be brought against a defendant in his firm name under Order 48A of the Rules of the Supreme Court, 1957, a plaintiff could bring an action in the name of his trading firm. The defendant entered appearance to the action without taking any objection to the manner in which the suit was framed, and no objection was taken to it in his statement of defence which he filed subsequently.

At the trial of the action, however, a preliminary point of law was taken on his behalf to the effect that a sole proprietor is precluded from bringing an action

in court in his trading name by virtue of the provisions of Order 48A. The case of *Mason and Son* v. *Mogridge*[1] was cited as an authority for the point taken. Counsel for the plaintiff submitted that, as no objection was taken until the date of the trial of the action itself, the defendant must be presumed to have waived his objection. Having heard arguments from both sides, the learned trial judge granted leave for an amendment to the title of the action by substituting the name of the plaintiff in place of the name of his trading firm. This was done under R.S.C. 0.28, r.6. The trial of the action proceeded on the basis of the amendment allowed.

Briefly stated, the evidence of the plaintiff at the trial of the action was that he was the sole proprietor of "News and Periodical Stores" at 52, Bishop Street, Penang, with a branch firm of the same name in Seremban. He first employed the defendant as the manager of his Seremban branch some time in 1952 at a salary of $80 *per mensem* with free board, lodging, dhoby and barber expenses. The defendant left his service in September, 1961 and went back to India. He re-engaged the defendant in the same capacity on his return from India in July, 1962. It was orally agreed between them that the defendant would receive an increased salary of $125 *per mensem* with the same perquisites as before. It was also orally agreed that if the defendant showed a good profit he would receive a certain amount of bonus at the plaintiff's discretion, but there was no agreement that he would receive a commission of 20% on the net profits. The plaintiff concluded his examination-in-chief by denying that he gave the defendant any authority to take for himself the amount claimed.

Under cross-examination, the plaintiff denied that there were three witnesses present when the terms of the defendant's remuneration were agreed to in Penang. He again denied that he agreed to pay the defendant 20% of all the net profits. He went on to say that although he lived in Penang, he would visit the Seremban branch once every two months and whenever he did so he would go through the account books. He had noted certain amounts overdrawn by the defendant. He told the defendant not to overdraw, whereupon the defendant threatened to stop orders from all schools. He took no action as he was afraid that the defendant would carry out his threat. During the period of April 2, 1965 to March 31, 1966 the defendant withdrew a total sum of $2,448. He did nothing because he had no trustworthy person to replace the defendant. On May 18, 1966 the defendant took a sum of $500. He then decided that the defendant was going too far and therefore dismissed him.

The defendant's evidence at the trial briefly was that when he returned to Penang from India in 1962 the plaintiff orally agreed in the presence of three persons, two of whom had since returned to India, to pay him a salary of $125 a month with free board and lodging, dhoby and barber expenses and 20% of the net profits per year, that he received his salary monthly from the cashier for which he signed a voucher, that he received $8,342.05 from the firm which was given to him personally by the plaintiff partly in cash and partly by cheque over a period of four years before his services were terminated in May, 1966, and that he was still entitled to over $16,000 in commission from the plaintiff.

Mohamed Alla Pitchay (D.W. 1) gave evidence on behalf of the defendant to say that he was present together with two other persons when the plaintiff and the defendant reached an agreement orally as to the terms and conditions of the defendant's service. It was agreed that the plaintiff would pay to the defendant 20% of the net profits in addition to his salary. It was also decided at the meeting that a written agreement would be entered into within one week but the defendant went away to Seremban before this could be done. He was unable to explain why the defendant had never mentioned the written agreement.

At that stage, the plaintiff was recalled with leave of the court, and he denied that there was a meeting as alleged by the defendant and his witnesses at which the alleged oral agreement was made. Under further cross-examination, the plaintiff admitted that he had paid the defendant a sum of $8,000 as bonus for the period of three years of his previous employment, because the business was then thriving and the defendant had in fact overdrawn the same amount, so that it was merely a writing off of what had already been overdrawn by the defendant.

The defendant called one Nagaratnam s/o Andy (D.W.3) as his next witness. The evidence of this witness was that in 1966 he and two other persons, since deceased, were asked to settle a dispute between the defendant and the plaintiff. He said he was given to understand that the plaintiff had to give some commission to the defendant, that the plaintiff, for a reason of which he was not made aware, agreed in his presence to give the defendant $2,000, that the defendant did not tell him what percentage of commission he was entitled to, and that he and the other two did not advise the plaintiff to pay the defendant a commission but asked him to give the defendant $2,000 to enable him to go to India.

One Dorairaj s/o Kanniah (D.W.4) worked as an accounts clerk at the "News and Periodical Stores" from 1964 to 1966. He gave evidence to say that whenever cheques were required by the shop the plaintiff would send them from Penang, sometimes with the amounts and names of the payees filled in and sometimes left blank, and that the plaintiff had never complained to him that the defendant had wrongly asked him to fill in his name on the cheques.

At the conclusion of the case for the defence, the plaintiff was recalled by the court. In answer to questions put to him by the court, he said:

"When he was previously employed by me he had overdrawn $8,000 over a period of three years. He told me he wanted these sums urgently to send to India. There was no agreement for bonus then, and his overdrawing was with my approval because his salary was then very low.

On the present occasion I objected to his overdrawing. Despite his unsatisfactory performance I did not dismiss him earlier also for fear that I would not be able to collect from customers.

I tolerated the advances he took for some time but when he began to overdraw excessively I dismissed him."

Having heard all the evidence the learned trial judge accepted the plaintiff's evidence, allowed his claim and rejected the defendant's counter-claim. Against that decision the defendant has brought this appeal.

The first ground of appeal is that the learned judge erred in law in allowing the plaintiff to amend the title to the action which amounted to substitution of a plaintiff in one capacity with a plaintiff in a different capacity, and that he further failed to appreciate that the action was constituted contrary to the express provisions of O.48A of the Rules of the Supreme Court, 1957. The case of *Mason and Son* v. *Mogridge*[1] was cited to us, and it was urged on the authority of *Re Nos. 55 and 57, Holmes Road, Kentish Town*[2] that an amendment can be allowed only in the case of a misnomer. It was contended that this was not a case of a misnomer as the plaintiff's trading firm was not a legal entity, so that the plaintiff as a different entity could not be added as a party. The case of *Davies* v. *Elsby Brothers, Ltd.*[3] was cited as an authority for this proposition. That was a case in which the amendment applied for was refused on the ground that it involved the addition of the new defendant, a limited company, and was not merely the correction of a misnomer, for there had been two different entities, the firm and the company, with similar names, and on the further ground that the amendment was sought after the period of limitation had expired. The writ in that case correctly described the firm and, the date of the accident not being given, did not show that the company must have been intended. It was next said on the authority of *Tetlow* v. *Orela, Limited*[4] that the amendment would be allowed only if the original party was a living person.

I do not think there is any merit in this ground of appeal. In my opinion, the learned judge was right in allowing the amendment. This case can be clearly distinguished from the case of *Mason and Son* v. *Mogridge*.[1] This was not an Order 14 application as in that case. In that case no amendment was asked for; here there was an application for an amendment. In that case objection was taken immediately; here no objection was taken until four years after the filing of the action. Here there was a mistake as regards the name of the plaintiff. The action having been commenced in the name of the firm instead of the proprietor, it was a mere irregularity which could be corrected by an amendment under Order 28 and Order 16, rr. 2 and 12 of the Rules of the Supreme Court, 1957. "*Bona fide* mistake" in O.16, r. 2 includes a mistake of law as well as of fact (see *Duckett* v. *Gover*[5]).

The amendment was also rightly allowed on the ground that the defendant must be presumed to have waived the irregularity in that he entered an unconditional appearance to the action, made no point of the irregularity in his statement of defence and made no application for the suit to be struck out until the action came on for trial (see *Western National Bank of City of New York* v. *Perez, Triana & Co.*[6]). In *Hughes* v. *Pump House Hotel Company (No. 2)*[7] it was held that where an action has, through a *bona fide* mistake, been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the court to order the substitution of another person as plaintiff. The decision of Farwell J. in *Noble Lowndes and Partners (a Firm)* v. *Hadfields Ltd.*[8] would appear to support the substitution of the right plaintiff where through a *bona fide* mistake an action has been commenced in a firm name.

The second ground of appeal is that the plaintiff had sold his business before the trial of the action, so that at the date of hearing he had no interest in the subject matter of the claim. A short answer to this ground is that this point was never raised in the statement of defence or at the trial of the action. Moreover, no questions were directed to the plaintiff as to the terms under which he had sold his business.

The third ground of appeal is that the learned judge erred in law and fact in failing to scrutinize the evidence for the plaintiff in support of his case and to draw proper inferences from the inconsistencies, improbabilities and contradictions in his evidence. I can find no substance in this ground as it would seem clear from the judgment of the learned trial judge that he arrived at his conclusion upon consideration of the whole of the evidence before him, which he has discussed at great length in his judgment. It is to be observed that the defendant had in fact admitted taking the sum of $8,342.05 from the plaintiff's firm. It was for him to prove that there was an agreement to pay commission. Having heard his evidence and that of D.W. 1 and D.W. 3, the learned trial judge came to the conclusion that there was in fact no such agreement. That is a finding of fact with which this court has no power to interfere without sufficient grounds. Speaking for myself, I would say that I cannot find any.

The fourth ground of appeal is that the learned judge failed to appreciate that the plaintiff by his conduct had already waived all claims, if any, against the defendant for all sums of money which the defendant had allegedly drawn without authority. Here again, I am compelled to say that there is no merit in this ground. The plaintiff candidly admitted that he had written off a sum of $8,000 which the defendant had overdrawn during the earlier period of his employment. He said he decided to treat that sum as a bonus, but he maintained that he never agreed to pay any commission to the defendant when he re-employed him in 1962, although he had agreed to allow some sort of bonus at his entire discretion if the defendant showed profits in the firm.

The fifth ground of appeal is that the learned judge misdirected himself on the burden of proof which the defendant had to discarge in proving his case and rebutting the case of the plaintiff. I must confess that I am unable to understand for what reasons this ground has been raised. Burden of proof in a civil case is always on the balance of probabilities. It is not suggested how the judge misdirected himself, and there is nothing in his judgment to indicate any such misdirection.

The last two grounds of appeal deal with the evidence in general. It is said that the learned judge erred in law and fact in rejecting the evidence of the defendant and of his witnesses, and that in any event his findings are unreasonable. In my opinion, these two grounds are entirely frivolous. Having seen and heard the witnesses for both sides, the learned judge had the advantage, which this court cannot possibly have, to evaluate such evidence and to arrive at his conclusions on that evidence. It would seem clear to me that there was overwhelming evidence in support of the conclusions at which he arrived on questions of fact.

I would dismiss the appeal with costs.

**Suffian** and **Ong Hock Sim F.JJ.** concurred.

Solicitors: *A. K. J. D'Cruz & Co.; Murphy & Dunbar.*

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## ANNA JONG YU HIONG v. GOVERNMENT OF SARAWAK

**[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.) August 30, 1972]**

**[Kuching — Federal Court Civil Appeal No. 89 of 1971]**

*Damages — Assessment — Fresh evidence on future loss — Admission of, by Federal Court — Pension under Widows' and Orphans' Pensions Ordinance (Sarawak Cap. 90) — Whether consideration to be taken.*

*Practice and Procedure — Costs — Success on point not raised at trial — Award on appeal exceeding deposit in court.*

This was an appeal by the plaintiff against an award of damages by the High Court ([1972] 1 M.L.J. 103).

It was agreed at the trial and repeated in the grounds of appeal that the deceased had a chance of further promotion after reaching the maximum at $350. At the hearing of the appeal, the Federal Court admitted fresh evidence namely, an "offer of conversion to the clean wage system" recommended by the *Suffian* Salary Commission. On this scale the deceased should have reached the maximum of the scale at $425 after 10 years' service.

Another issue for determination was whether the monthly pension of $110.27 which the appellant had been receiving under the Widows' and Orphans' Pensions Ordinance, since the death of the deceased, should be taken into account.

**Held:** (1) the loss of future income must be reassessed on the basis that the deceased would continue to be in the same post but on the new timescale, until his retirement at the age of 55;

(2) the pension of $110.27 should not be taken into consideration;

(3) on that basis and assessing it on the new salary scale but using the trial judge's method of calculation, the general damages, after the necessary deductions, must be assessed at $43,000, which was to be apportioned accordingly between the widow and the two infants. The damages due to the two infants must be paid to the Public Trustee;

(4) since the appellant had succeeded on a point not raised in the court below, and since she was only partly successful in this appeal, no costs were to be awarded. With regard to costs in the court below, since the amount awarded on appeal exceeded the amount deposited by the respondent in court, the appellants were to have the costs in the court below.

*Cases referred to:-*

(1) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 at p. 606.

(2) *Parry* v. *Cleaver* [1969] 1 All E.R. 555 at p. 560.

(3) *Mallet* v. *McMonagle* [1969] 2 All E.R. 178.

(4) *Hussey* v. *Horne-Payne* (1878) 8 Ch. D. 670 at p. 679.

FEDERAL COURT

*T. O. Thomas* for the appellant.

*Denis Ong Jiew Fook* (State Counsel) for the respondent.

**Azmi L.P.:** This is an appeal by the plaintiff against an award of damages made by the High Court at Kuching.

The plaintiff as the widow and the administratrix of the estate of her husband, sued her husband's employer, the Government of Sarawak for loss of support under the Fatal Accidents Acts and also for damages under the Law Reform (Miscellaneous Provisions) Act 1934 on the ground that her husband was killed by the negligent act of another Government employee. The defendant admitted negligence. So the learned trial judge proceeded with the case on the question of damages only. The learned judge made the following awards in favour of the plaintiff and her two children: -

(1) $1,000 for funeral expenses.

(2) General damages — $21,758.72 cts to be apportioned on the following basis:—

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|---|---|---|
| Widow | — | $14,505.82 |
| First Child<br>Second Child | ) | $ 7,252.90 |

By reason of section 2 of the Application of Laws Ordinance of Sarawak (Cap. 2) the following laws of the United Kingdom as on 12th December 1949 would be applicable to this case: (i) The Fatal Accidents Act 1846, (ii) Fatal Accidents (Damages) Act 1908, (iii) Law Reform (Miscellaneous Provisions) Act 1934, (iv) Law Reform (Contributory Negligence) Act of 1945 and (v) Law Reform (Personal Injuries) Act 1948. In the result section 40 of the Widows, Orphans and Old Age Contributory Pension Act of 1936 did not apply. That section provides that in assessing damages in any action under the Fatal Accidents Act 1846 to 1908, whether commenced before or after the commencement of the Acts, any widows' pension, additional allowance or orphans' pension payable under the Acts shall not be taken into account.

I will now refer to the relevant facts of the case which are not disputed. The deceased at the time of his death was an Overseer Artisan Grade I employed in the Public Works Department of Miri, Sarawak. He was 29 years of age and on his death left the plaintiff as his widow and two children, then aged 16 months and 6 months respectively. At that time his salary was $230 p.m. on a timescale of $230 x 10 – $350. If he should continue to live and remain in the service of the Government he would at the end of 8 years reach the maximum of the scale at $350.

It was argued at the trial and repeated in the grounds of appeal that the deceased would have a